Supreme Court, U.S.
FILED
JUL 8 1988
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 87-1705

In the Supreme Court of the United States

OCTOBER TERM, 1988

BERNARD M. BARRETT, JR., AS PRESIDENT OF PLASTIC AND RECONSTRUCTIVE SURGEONS, P.A., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS

CHARLES FRIED
Solicitor General
WILLIAM S. ROSE, JR.
Assistant Attorney General
CHARLES E. BROOKHART
WILLIAM A. WHITLEDGE
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

10 pp

QUESTION PRESENTED

Whether, in the course of an action brought by the Internal Revenue Service to enforce a summons, the court may place restrictions on the disclosure of the summoned information.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Discussion	5
Conclusion	7

TABLE OF AUTHORITIES

Cases:

Church of Scientology v. *IRS*, No. 86-472 (Nov. 10, 1987) 3
Donaldson v. *United States*, 400 U.S. 517 (1971) 6
Dunn v. *Ross*, 356 F.2d 664 (5th Cir. 1966) 4
United States v. *Arthur Young & Co.*, 465 U.S. 805 (1984) 6
United States v. *Author Services, Inc.*, 804 F.2d 1520 (9th Cir. 1986) 5
United States v. *Bisceglia*, 420 U.S. 141 (1975) 6
United States v. *Powell*, 379 U.S. 48 (1964) 6
United States v. *Sherlock*, 756 F.2d 1145 (5th Cir. 1985) 5
United States v. *Texas Heart Institute*, 755 F.2d 469 (5th Cir. 1985) 2, 3, 4, 5
United States v. *Zolin*, 809 F.2d 1411, reh'g en banc granted, 832 F.2d 127 (1987), order granting reh'g vacated, 842 F.2d 1135 (9th Cir. 1988), petition for cert. pending, No. 88-40 ..... 5, 6, 7

Statute:

Internal Revenue Code of 1954 (26 U.S.C.):
§ 6103 ..... 2, 3
§ 6103(a) 3
§ 6103(c)-(o) 3
§ 6103(k)(6) 3

In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-1705

BERNARD M. BARRETT, JR., AS PRESIDENT OF PLASTIC AND RECONSTRUCTIVE SURGEONS, P.A., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the en banc court (Pet. App. A3-A41) is reported at 837 F.2d 1341. The order granting rehearing en banc (Pet. App. A42-A43) is reported at 812 F.2d 936. The second panel opinion (Pet. App. A44-A56) is reported at 804 F.2d 1376. The earlier panel opinion (Pet. App. A57-A72), withdrawn upon the grant of panel rehearing, is reported at 787 F.2d 958. The district court's findings of fact and conclusions of law (Pet. App. A73-A78) and its memorandum and order denying reconsideration (Pet. App. A81-A83) are unreported.

JURISDICTION

The judgment of the en banc court of appeals was entered on February 24, 1988. The petition for a writ of certiorari was filed on April 15, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a doctor and the president of an incorporated medical practice. When an audit of petitioner's personal and corporate income tax returns revealed a $100,000 discrepancy between the amounts deposited into petitioner's bank accounts and the amounts of gross income shown on his tax returns, the Internal Revenue Service (IRS) transferred the case to its criminal division. Pet. App. A5. An informant advised the investigating special agent, respondent Hanson, that petitioner had not reported as income all of the payments received from his patients (*id.* at A120). Accordingly, Agent Hanson determined that it would be necessary to inquire of petitioner's patients the amount that each had paid for the medical services rendered. To that end, Agent Hanson issued administrative summonses to all of the hospitals at which petitioner practiced, and all but four of them provided the agent with a list of petitioner's patients. Agent Hanson mailed to each of those patients a form letter stating that petitioner was under investigation by the IRS Criminal Investigation Division and requesting information about the fees paid to him. *Id.* at A5.

The government petitioned for enforcement of the summonses issued to the four hospitals that had not supplied patient lists. The district court refused to enforce the summonses, objecting in part to the letters that had been sent to the patients whose identities had been divulged by the other hospitals. The court of appeals vacated and remanded. *United States* v. *Texas Heart Institute*, 755 F.2d 469 (5th Cir. 1985) (reprinted at Pet. App. A86-A113). It ordered the summonses enforced, holding, inter alia, that petitioner's assertion that the letters unlawfully divulged confidential information, in violation of 26 U.S.C. 6103, provided no basis for doubting the IRS's good faith in

issuing the summonses and therefore no basis for not enforcing them.[1] The court added, however, that if the district court determined on remand that unlawful disclosures had been made to the patients, the "enforcement of the summonses may be conditioned on an IRS agreement to cease such improper disclosures" (755 F.2d at 481).

2. This case concerns a summons that was issued by the IRS seeking records of petitioner's medical practice. When petitioner failed to comply with the summons, the IRS brought this enforcement action in the United States District Court for the Southern District of Texas. The district court enforced the summons unconditionally (Pet. App. A73-A78). Relying on *Texas Heart*, a panel of the court of appeals affirmed the enforcement of the summons (Pet. App. A44-A56), but ordered the case remanded to the district court with instructions "to consider whether enforcement of the IRS summons should be conditioned in order to protect [petitioner] against un-

---

[1] 26 U.S.C. 6103(a) generally prohibits the IRS from disclosing tax "return information" except in the circumstances specifically permitted by that section. See generally *Church of Scientology* v. *IRS*, No. 86-472 (Nov. 10, 1987), slip op. 1-3. The statute then sets forth in considerable detail the circumstances under which such disclosures are authorized to certain identified parties, including specified government agencies, congressional committees, and representatives of a taxpayer. See 26 U.S.C. 6103(c)-(o). The information that Barrett was under investigation falls within the definition of "return information" that is protected by Section 6103. The government's position was that the disclosure in the letters was authorized by 26 U.S.C. 6103(k)(6), which permits the disclosure of return information "to the extent * * * necessary in obtaining information" in connection with an audit or other investigation related to the enforcement of the revenue laws.

necessary disclosure of the fact that he is under criminal investigation" (*id.* at A50).[2]

The court of appeals granted the government's petition for rehearing en banc and held that the district court was correct in refusing to condition enforcement of the summons (Pet. App. A3-A41). The en banc court unequivocally held (*id.* at A25): "[I]n a summons enforcement proceeding the only issue that the district court can decide is whether to enforce the summons. The court cannot conditionally enforce that order." The court explained (*id.* at A22):

> There is no statutory authority, nor congressional indication that existing statutes supply the authority, nor Supreme Court authority, to allow the district court to make any consideration except whether to enforce or not to enforce the summons. The district court does not have the power to conditionally enforce the summons. If good faith and a legitimate purpose are found to exist, the summons should be enforced. If they are not present, enforcement should be denied. There is no middle ground because to create that remedy would unduly hamper the investigative efforts of the IRS.

Accordingly, the court explicitly overruled *Texas Heart* (Pet. App. A25), along with an earlier case, *Dunn* v. *Ross*, 356 F.2d 664 (5th Cir. 1966), to the extent that case could

---

[2] The panel had originally voted 2-1 to affirm the district court's unconditional enforcement order in full (Pet. App. A57-A72). The panel subsequently granted petitioner's rehearing petition, however, and concluded that it was bound by *Texas Heart* to instruct the district court to consider the issuance of a conditional enforcement order. Judges Reavley and Hill filed a concurring opinion stating their view that *Texas Heart* was wrongly decided (Pet. App. A50-A53).

be read "to endorse the district court's ability to conditionally enforce a summons" (Pet. App. A23). Four judges dissented, arguing that *Texas Heart* had been correctly decided (Pet. App. A26-A40). Two other judges did not reach the merits, dissenting on the ground that the case was moot because the documents in question had been turned over to the IRS (*id.* at A40-A41).[3]

DISCUSSION

While we believe that the decision below is correct, we agree with petitioner (see Pet. 25-28) that the decision below creates a clear conflict in the circuits. The Ninth Circuit, in *United States* v. *Author Services, Inc.*, 804 F.2d 1520, 1525-1526 (1986), and *United States* v. *Zolin*, 809 F.2d 1411, 1416-1417, reh'g en banc granted, 832 F.2d 127 (1987), order granting reh'g vacated, 842 F.2d 1135 (1988), petition for cert. pending, No. 88-90, has approved the conditional enforcement of summonses, with restrictions on the use of the summoned material. Indeed, both of those decisions cited approvingly the *Texas Heart* decision that was overruled by the en banc court below. See 809 F.2d at 1417; 804 F.2d at 1525-1526. The court of appeals in *Zolin* stated unequivocally that the rule in the Ninth Circuit is that "[a] district court may, when appropriate, condition enforcement of a summons on the IRS's agreeing

[3] The general rule is that compliance with a summons renders moot an appeal from an enforcement order (see, *e.g.*, *United States* v. *Sherlock*, 756 F.2d 1145, 1146 (5th Cir. 1985), and cases cited at Pet. App. A12 n.6), and, indeed, the government originally advised the en banc court of appeals in a supplemental brief that it believed that petitioner's compliance had mooted the case. The court concluded, however, that the case was not moot because there remained a live controversy over whether the district court could attach conditions to the government's use of the summoned material (Pet. App. A10-A18; see also *id.* at A26), and we now agree with that holding.

to abide by disclosure restrictions" (809 F.2d at 1417). Clearly, that rule directly conflicts with the Fifth Circuit's rule stated in the decision below, viz., "[t]he district court does not have the power to conditionally enforce the summons" (Pet. App. A22). Indeed, the Fifth Circuit here expressly acknowledged the conflicting Ninth Circuit authority (*id.* at A25 n.11).

For reasons stated in greater detail in our petition for a writ of certiorari in *Zolin* (at 13-19), we believe that the court below correctly held that the district court lacks the authority in a summons enforcement proceeding to condition enforcement by imposing restrictions upon the IRS's use of the summoned information. Summons enforcement proceedings are intended to be summary and to be limited to determining the IRS's right to obtain the requested information. See, *e.g.*, *Donaldson* v. *United States*, 400 U.S. 517, 529 (1971); *United States* v. *Powell*, 379 U.S. 48, 57-58 (1964). The summons authority is a broad one, which effectuates "a congressional policy choice in favor of disclosure of all information relevant to a legitimate IRS inquiry" (*United States* v. *Arthur Young & Co.*, 465 U.S. 805, 816 (1984) (emphasis omitted)), and it should not be restricted " 'absent unambiguous directions from Congress' " (*ibid.*, quoting *United States* v. *Bisceglia*, 420 U.S. 141, 150 (1975)). The imposition of conditions on the enforcement of a summons—and litigating the question whether such conditions should be imposed—sharply departs from these principles. It greatly expands the district court's limited role of determining whether an IRS summons has been issued in "good faith," and hence whether it should be enforced, into a continuing role as a "monitor [of] the IRS' use of the summoned documents" (*United States* v. *Zolin*, 809 F.2d at 1417).

In our view, the Ninth Circuit's rule authorizing the conditional enforcement of summonses poses a serious threat to the IRS's ability to conduct efficient tax investigations.

Allowing the district court to monitor the IRS's use of the summoned documents and allowing the parties in summons enforcement proceedings to litigate the question whether conditions should be imposed would inject substantial delays into the process that will severely impair the summary nature of summons enforcement proceedings. We therefore agree with petitioner that the issue presented in this case is an important one and that resolution of the conflict in the circuits warrants the attention of this Court. Accordingly, we do not oppose the petition for a writ of certiorari.[4]

CONCLUSION

The petition for a writ of certiorari should be granted or, alternatively, held pending the disposition of the petition in *United States* v. *Zolin*, No. 88-40.

Respectfully submitted.

CHARLES FRIED
Solicitor General
WILLIAM S. ROSE, JR.
Assistant Attorney General
CHARLES E. BROOKHART
WILLIAM A. WHITLEDGE
Attorneys

JULY 1988

[4] The government's petition for a writ of certiorari in *Zolin* presents two distinct issues on which there are conflicts in the circuits that we believe require resolution by this Court. In addition to the question presented here, the petition in *Zolin* also presents the question whether evidence independent of the communication at issue must be introduced in order to invoke the crime-fraud exception to the attorney-client privilege. Accordingly, we believe the Court should grant that petition and suggest that it may wish to hold this case pending the disposition of *Zolin*.

U.S. GOVERNMENT PRINTING OFFICE 1988—202 037/60538